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Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-1575, 77-1648, 77-1662

FEDERAL COMMUNICATIONS COMMISSION,
AMERICAN CIVIL LIBERTIES UNION,
NATIONAL BLACK MEDIA COALITION, ET AL.,
Petitioners,

v.

MIDWEST VIDEO CORPORATION, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI ON BEHALF OF RESPONDENT MIDWEST VIDEO CORPORATION

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The Federal Communications Commission ("the Commission"), American Civil Liberties Union ("ACLU") and National Black Media Coalition, Citizens for Cable Awareness in Pennsylvania and the Philadelphia Community Cable Coalition (collectively referred to as "NBMC") have petitioned for Supreme Court review of a decision of the United States Court of Appeals for the Eighth Circuit (A 1-92) which set aside a Report and Order ("the Order") of the Commission (A 93-181) amending its rules requiring certain cable television systems to provide access channels and meet certain two-way, channel

capacity and equipment requirements.[1] For the reasons set forth below, Midwest Video Corporation ("Midwest") urges that the Petitions filed by the Commission, ACLU and NBMC each be denied.

I. BACKGROUND AND COUNTERSTATEMENT

Midwest had earlier challenged a Commission rule ("the mandatory origination rule") requiring cable systems with more than 3,500 subscribers to operate to a significant extent as a local outlet by cablecasting. While Midwest's challenge to that rule had been upheld by the Eighth Circuit,[2] this Court, by a closely divided vote, reversed the Eighth Circuit and sustained the Commission's authority to adopt the mandatory origination rule. *U.S.* v. *Midwest Video Corp.*, 406 U.S. 649 (1972) ("*Midwest I*"). That rule had been stayed by the Commission pending Supreme Court review, and even after this Court's *Midwest I* decision, the Commission never lifted its stay and ultimately repealed the rule.[3]

By the time of this Court's *Midwest I* decision, access channel, two-way, channel capacity and equipment rules applicable to cable systems in the 100 largest television markets had been adopted and were in effect.[4] Those rules were the predecessors of rules here in issue, but they were not applicable to Midwest because none of its cable systems were

[1] References to the access rules will hereinafter include references to the two-way, channel capacity and equipment rules because of the interrelationship between these requirements. See A 18-19, n. 21.

[2] *Midwest Video Corp.* v. *FCC*, 441 F.2d 1322 (1971).

[3] *Report and Order in Docket No. 19988*, 49 FCC 2d 1090 (1974).

[4] *Cable Television Report and Order*, 36 FCC 2d 143 (1972).

located in the top 100 markets. However, at the time the Commission repealed its mandatory origination rule in 1974, it adopted another rule ("the equipment availability rule") which became applicable on January 1, 1976 to cable systems which had more than 3,500 subscribers and which were not already subject to the access and related requirements. The equipment availability rule required cable systems to which it was applicable to make time available on their channels and have equipment available for use by members of the public but did not contain the detailed requirements of the access, two-way or channel capacity rules. The equipment availability rule was in effect for only a short time, from January to June 1976, when it was replaced by the access, two-way, channel capacity and equipment rules here in issue.[5] Midwest sought review of the access rules in this proceeding immediately after the rules were amended to become applicable for the first time to Midwest.

The Commission seeks to treat the access and related rules as a natural and logical outgrowth of the mandatory origination rule, and neither it nor ACLU in their Petitions describe how the access rules operate or how they differ from the mandatory

[5] Pursuant to a limited grandfathering provision in the access rules Section 76.254(f) (A 172)), they did not become fully applicable to Midwest until early 1977. Midwest challenged the Commission's authority to adopt the equipment availability rule in *Midwest Video Corp.* v. *FCC*, Case No. 75-1671 (8th Cir.), but before the case was argued, the equipment availability rule was repealed and merged into the rules now before the Court. Midwest accordingly dismissed its appeal and no decision on the validity of the equipment availability rule was ever rendered.

origination rule.[6] Since Midwest believes that the access rules use vastly different means to achieve totally different purposes from those involved in the mandatory origination rule, it is important at the outset to highlight the differences between the mandatory origination rule upheld by this Court in *Midwest I* and the access rules set aside by the Eighth Circuit in this proceeding. The principal differences are as follows:

1. While the mandatory origination rule did not require the dedication of a channel solely for origination and left to the cable operator's discretion where and when on his channels he would provide program origination, the access rules now before the Court require cable operators to set aside channels for public, educational, local government and leased access users.[7] The public access channel must be made

[6] NBMC in its Petition does attempt to describe the access rules (Pet. 9-13), but Midwest believes that its description requires the following clarifications or corrections. First, the paragraph beginning on p. 11 of NBMC's Petition may be read as indicating that the access requirements become applicable only on demand. At least one channel must be reserved for access irrespective of demand (Section 76.254(c) (A 171)) except in the limited number of situations where an existing cable system was, on the effective date of the amended rules, fully utilizing its activated channel capacity. A cable operator who, after the effective date of the rule, commenced providing a service other than access on his last available channel, whether or not any use was being made of that channel, was guilty of bad faith (A 145). Second, at p. 12 of its Petition NBMC states that when the channel reserved for access is not being so used, the cable system can use the channel for other broadcast or non-broadcast purposes. NBMC has, however, ignored the exception to Section 76.254(b), which specified that "at least one channel shall be maintained *exclusively* for the presentation of access programming ..." (emphasis supplied) (A 202). See also the Commission's discussion of this requirement at A 196-197.

[7] Section 76.254(a) of the rules (A 170).

available for noncommercial use by members of the public, and both it and the leased access channel must be made available to all comers on a first-come, nondiscriminatory basis.[8] While separate channels need not initially be assigned for each type of access use, the rules require, within the limits of the activated channel capacity of the system, the dedication of one channel solely for access purposes irrespective of demand,[9] the assignment of fulltime channels for each type of access when there is a demand therefor,[10] and the activation of additional access channels when specified usage criteria are met.[11]

2. While the mandatory origination rule imposed no channel capacity and two-way transmission requirements, the access rules require new cable systems to provide a minimum channel capacity of twenty channels and the technical capacity for two-way, non-voice communications.[12] Cable systems subject to the access rules are required to maintain one channel for access even though little or no use is being made of the channel and even if the cable operator desires to use the channel to increase program diversity by, for example, voluntarily originating his own programming or providing pay television programming.[13]

3. While the mandatory origination rule imposed no limitations on how the cable operator might recoup the costs he incurred for the use of his channels in providing originated program-

[8] Sections 76.256(d) (1) and (3) (A 173-174).

[9] Section 76.254(b) (A 202).

[10] *Ibid.*

[11] Section 76.254(d) (A 171).

[12] Section 76.252(a) (A 168). Top 100 market systems in operation prior to March 31, 1972 and other systems in operation by March 31, 1977, have until June 21, 1986 to comply with this requirement. Section 76.252(b) (A 169).

[13] Section 76.254(b) (A 202); Order ¶ 69 (A 145).

ming (e.g. through advertising or charges to programmers), the access rules specify that one public access channel must always be available without charge and that the educational and local government access channels must be made available without charge for five years from the date that they are first utilized.[14]

4. While the mandatory origination rule contained no limitations on how the cable operator might recoup his equipment and personnel costs and when he might schedule the working hours of his technicians, the access rules specify that no charge may be made for equipment, production or personnel costs for live public access programs not exceeding five minutes in length and that for longer public access programs, charges must be reasonable and consistent with the goal of affording users a low-cost means of television access.[15] The Commission has interpreted this rule to mean that even when charges for equipment and personnel might otherwise be made to public access users (such as for a presentation over five minutes in length), the cable operator may not charge the public access user for the use of playback equipment or the time incurred by cable company personnel if the tape or film can be played without further technical alteration to the cable system's equipment.[16] Moreover, the cable operator may not limit the use of access channels to normal business hours.[17] Cable operators must thus have equipment and personnel available or on call at their own expense to operate playback equipment for an

[14] Section 76.256(c)(1) and (2) (A 173).

[15] Section 76.256(c) (3) (A 173).

[16] *Memorandum Opinion and Order Denying Reconsideration of the Report and Order in Docket No. 20508 ("Reconsideration")*, ¶ 15(d) (3) (A 199-200).

[17] *Reconsideration.* ¶ 15(d) (2) (A 198-99).

unspecified but substantial number of hours beyond the normal workday.

5. While the mandatory origination rule left to the cable operator complete control over what programming would be provided on the cable system, the access rules specify that the cable operator shall have no control over the content of access programming except to the extent necessary to prohibit the transmission of lottery information and, for all but leased access channels, commercial matter.[18] Thus, the cable operator not only cannot make judgments about program quality and suitability (even though the programming on access channels may cause subscribers to disconnect their service or may evoke sanctions (including non-renewal) from the franchising authority), but if the access user is utilizing the cable system's last available channel, the cable operator cannot even prevent an access user from providing a service that duplicates a service the cable operator is already providing (such as recent motion pictures). Thus, even if the cable operator or another party is willing and able to provide such readily available non-duplicative programming as live sports programs distributed by satellite or a children's channel consisting of cartoons and other children's programming, the cable operator cannot displace an access user to present such varied programming. Furthermore, the cable operator cannot prevent access users from presenting

[18] Sections 76.256(b) and (d) (A 172-175). The rules also required the cable operator to adopt and enforce rules prohibiting obscene or indecent matter on access channels (Section 76.256(d) (A 173-75). This aspect of the rules was invalidated by the Eighth Circuit because it constituted prior restraint without sufficient procedural safeguards (A 75-77). The Commission is not challenging this aspect of the Court's decision (Pet. 15-16, n. 15), and the discussion of it by NBMC (Pet. 32-33) is unnecessary.

> types of programming which may subject the cable operator to civil or criminal liability, such as defamatory or obscene material.[19]

In short, the mandatory origination rule imposed an obligation on cable systems that was analogous to the type of obligations the Commission expects of broadcasters—to provide a locally-originated video service to their communities. The access rules, on the other hand, require cable systems to divest themselves from all control over the programming on their access channels and who may use them, forego the possibility of earning any revenue from the service provided on most access channels, and have equipment and personnel available or on call, in many instances without charge, at the whim of access users.

II. THE IMPORTANCE OF THE CASE

The Commission argues that this case "presents a question of great importance as to the Commission's capacity to implement its statutory mandate and integrate new media into the national communications structure" (Pet. 19). But a scant three and a half years ago, when the Commission repealed its mandatory origination rule, it recognized the futility of that rule:

> Quality, effective local programming demands creativity and interest. These factors cannot be mandated by law or contract. The net effect of attempting to require originiation has been expenditure of large amounts of money for

[19] The problems arising from the cable operator's potentiial liability for these kinds of programming are addressed by the Eighth Circuit at A 79-82.

> programming that was, in many instances, neither wanted by subscribers nor beneficial to the system's total operation. In those cases in which the operator showed an interest or the cable community showed a desire for local programming, an outlet for local expression began to develop regardless of specific legal requirements. During the suspension of the mandatory rule, cable operators have used business judgment and discretion in their origination decisions. For example, some operators have felt compelled to originate to attract and retain subscribers. Those decisions have been made in light of local circumstances. This, we think, is as it should be. *Report and Order in Docket No. 19988*, 49 FCC 2d 1090, 1105-06 (1974).

In the Order in this proceeding, the Commission specifically found that "while it would appear that the use of access channels is growing, in the vast majority of communities presently providing multiple channels for access use, these channels are at best sporadically programmed", (A 138) and in its Reconsideration, the Commission recognized that "even larger systems typically have difficulty finding access channel users" (A 191). Notwithstanding the Commission's willingness to leave decisions about program origination to marketplace forces and local circumstances, the Commission refused to follow a similar course of action with respect to access requirements:

> Were we at this stage of cable's evolution to leave the provision of channel capacity and access services entirely to the marketplace, such action could have the practical effect of providing a barrier to the growth of access services which we expect of cable. (A 156)

The Eighth Circuit correctly views these and related facts as questioning whether there was an adequate record before the Commission to support the adoption of the access rules and whether the Commission's action was arbitrary and capricious (A 82-91). These facts also demonstrate that this case is not of sufficient importance to warrant Supreme Court review. Thus, even if the access rules were not subject to the other infirmities discussed in the Eighth Circuit's opinion, the Commission's own findings in this proceeding demonstrate that there is no significant current demand for access channels. The Commission has also failed to explain why, even if any significant demand for access to cable systems existed, it would not be able to rely on the free play of market forces and the economic self-interest of cable operators to satisfactorily accommodate that demand, just as it ultimately concluded would be a satisfactory substitute for its mandatory origination rule.[20] This case therefore involves only the Commission's authority to impose burdensome requirements on an industry to promote a type of activity which does not exist on a large scale, which the Commission only hopes will develop in the future, and which, if it does develop, may well be accommodated by marketplace forces.

III. THE JURISDICTIONAL QUESTION

(a) The Court Below's Discussion of Objectives and Means Was Mandated by the Decisions of this Court.

The Commission, ACLU and NBMC urge that the Eighth Circuit's resolution of the jurisdictional

[20] Such a result would be particularly appropriate in view of the fact that the Commission (Pet. 7-10) argues that the access rules promote the same goals as the mandatory origination rule.

question conflicts with this Court's decisions in *U.S.* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) ("*Southwestern*") and in *Midwest I. Southwestern*, a case involving Commission regulation of the carriage of television signals by cable systems, upheld the Commission's authority to regulate cable television to the extent that it was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." 392 U.S. at 178. *Midwest I* applied the reasonably ancillary test to the Commission's authority to adopt rules not relating to the carriage of broadcast signals—in that case the requirement that certain cable systems originate their own programming. Both cases recognize that the basis for the Commission's authority over cable television is Section 2(a) of the Communications Act, 47 U.S.C. § 152(a).

The Commission (Pet. 7) and NBMC (Pet. 25) argue that the Eighth Circuit overlooked relevant statutory provisions, with the Commission urging that the Court failed to consider Section 2(a) and instead read the Commission as having sought to derive its regulatory power from the objectives it was pursuing and NBMC arguing that the Court never examined the relevant statutory sections relied upon by the Commission and this Court in *Midwest I*. This argument totally misconceives the opinion of the Eighth Circuit. While the Eighth Circuit did not discuss either Section 2(a) or the other statutory provisions relied on by the Commission in any detail,[21] there was no reason for it to do so since there

[21] The Court did refer to Section 2(a) when it quoted from this Court's *Midwest I* opinion at A 25. It discussed the statutory provisions relied on by the Commission at A 22-23, n. 25.

was never any dispute that Section 2(a) provided the jurisdictional base for the Commission's regulation of cable television or that the Commission's authority to adopt access rules was not specifically covered by the other statutory provisions it cited. What the Eighth Circuit held was that this Court itself in *Midwest I* recognized that "§ 2(a) does not in and of itself prescribe any objectives for which the Commission's regulatory power might properly be exercised",[22] and that therefore, in order for the regulations to meet the reasonably ancillary test, there must also be a nexus between the specific regulations adopted by the Commission and the provisions of the Communications Act relating to broadcasting.[23] The

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[22] 406 U.S. at 661.

[23] Another court has similarly understood the jurisdictional test derived from *Southwestern* and *Midwest I*:

> " . . . we think that the Commission must either demonstrate specific support for its actions in the language of the Communications Act or at least be able to ground them in a well understood and consistently held policy developed in the Commission's regulation of broadcast television." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 28 (1977), *cert. denied* 98 S.C. 111 (1977) ("*Home Box Office*").

See also *National Association of Regulatory Utility Commissioners v. FCC*, 533 F. 2d 601, 612 (D.C. Cir. 1976) ("*NARUC II*").

The Commission (Pet. 12-13, n. 10) seeks to create the erroneous impression and ACLU explicitly argues (Pet. 11-12, n. 9) that based upon *American Civil Liberties Union, Inc. v. FCC*, 523 F.2d 1344 (9th Cir. 1975) (*ACLU*) and *Brookhaven Cable TV, Inc. v. Kelley*, _____F.2d._____(2nd Cir. 1978) (*Brookhaven*) there is a conflict between the circuits over the extent of its jurisdiction over cable television under this Court's *Southwestern* and *Midwest I* decisions. *ACLU* upheld the Commission's denial of proposals that the Commission impose a complete system of common carrier regulation on access channels and limit the cable operator's own program origination efforts to one channel per system. In doing so, there was language in the opinion indicating that the 1972 access rules were reasonable.

Eighth Circuit's discussion of objectives and means therefore constituted its effort to determine whether there was a sufficient statutory nexus to support the Commission's assertion of jurisdiction. Thus, contrary to the Commission's argument, the Court's discussion of means and objectives was mandated by this Court's decision in *Midwest I* and did not result from any overlooking of Section 2(a), and contrary to NBMC's argument, the Court looked to specific statutory provisions to determine whether a satisfactory nexus existed.

But, as the Eighth Circuit noted (A 10, n. 14), there was no party before the Court in ACLU challenging the Commission's jurisdiction to issue access rules. Arguments of the kind relied upon by Midwest and accepted by the Eighth Circuit were therefore not before the Court in *ACLU* and were not decided in that opinion. In *Brookhaven*, the Court distinguished this case because it involved the imposition of common carrier obligations on cable systems. Moreover, in *Brookhaven*, the Court was simply upholding the Commission's application of a policy—that pay cable operations should not be subject to governmental rate regulation— which the Commission had adopted in 1968 with respect to pay television operations by broadcast stations. See *Fourth Report and Order in Docket No. 11279*, 15 FCC 2d 466, 547-48 (1968). Such a result is entirely consistent with the reasonably ancillary test. NBMC argues (Pet. 28-29) that not only *ACLU* and *Brookhaven*, but also *NARUC II* and *Home Box Office* are contrary to the Eighth Circuit's holding in this case. But *NARUC II*, utilizing in the same analysis of the Commission's jurisdiction as was utilized by the Eighth Circuit, 533 F.2d at 612, invalidated the Commission's effort to preempt from state public utility regulation the provision of two-way nonvideo communications on cable television access channels. *Home Box Office*, relying upon a similar analysis, invalidated Commission rules restricting the programming judgments of cable operators about what programs they might offer on their channels utilized to provide pay cable service. Thus, these cases support the Eighth Circuit's decision here.

(b) The Access Rules Do Not Meet the Reasonably Ancillary Test.

The Commission argues that it has in any event met the reasonably ancillary test of *Southwestern* and *Midwest I* because the access rules "were adopted for the express purpose of 'increasing the number of outlets of local self expression and augmenting the diversity of programs and types of services available to the public' " (Pet. 9). In *Midwest I* this Court found that, as applied to the mandatory origination rule, this purpose was "plainly within the Commission's mandate for the regulation of television broadcasting." 406 U.S. at 668. But there was nothing in the mandatory origination rule that was otherwise inconsistent with either the goals or means accorded to the Commission to regulate television broadcasting.[24] That is not the case here.

In *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1973) ("*CBS*"), this Court upheld the Commission's refusal[25] to impose access obligations on broadcasters, noting the fact that "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations," 412 U.S. at 110, and that on several occasions the Commission has ruled "that no private individual or

[24] See *e.g. Report and Statement of Policy re: Commission En Banc Programming Inquiry,* 20 Pike & Fischer RR 1901 (1960).

[25] The Commission decisions which were affirmed in *CBS* were based on the same statutory considerations as was the decision of this Court. See *Democratic National Committee,* 25 FCC 2d 216 (1970); *Business Executives Move for Vietnam Peace,* 25 FCC 2d 242 (1970). These decisions were not cast in terms of Commission discretion.

group has a right to command the use of broadcast facilities." 412 U.S. at 113. In doing so, the Court stressed the fact that Congress had on several occasions rejected proposals that would require broadcasters to give up editorial control over their facilities and open their microphones to all comers. 412 U.S. at 105-09. Of equal importance, the Court also recognized that implementation of a right of access scheme would raise serious Constitutional problems:

> The Commission's responsibilities under a right of access system would tend to draw it into a continuing case by case determination of who should be heard and when. Indeed, the likelihood of governmental involvement is so great that it has been suggested that the accepted constitutional principles against control of speech content would need to be relaxed with respect to editorial advertisements. To sacrifice First Amendment protections for a speculative gain is not warranted, and it is well within the Commission's discretion to construe the Act so as to avoid such a result. [footnotes omitted] (412 U.S. at 127)

Thus, the cable television access rules are contrary to an important broadcast regulatory goal of according significant discretion to broadcasters to determine what programming will be provided over their facilities.[26]

[26] *See also Straus Communications, Inc. v. FCC,* 530 F.2d 1001 (D.C. Cir. 1976); *Writers Guild of America West, Inc. v. FCC,* 423 F. Supp. 1064 (C.D. Cal. 1976), appeal pending. The Commission tries to avoid the force of this argument by

The access rules also require cable systems to operate as communications common carriers on their access channels—a situation that did not exist with the mandatory origination rule.[27] In light of the language in Section 3(h) of the Communications Act, 47 U.S.C. § 153(h), that a person "engaged in radio broadcasting shall not ... be deemed a common carrier", the Eighth Circuit (A pp. 59-64) also concluded that the access rules imposed a means of regulation on cable

asserting that *CBS* merely affirmed the Commission's discretion to decline to adopt a right of access policy applicable to broadcast stations. But as the discussion above and the Court's full opinion in *CBS* make clear, the Commission was affirmed because of clear indications of Congressional policy and because of Constitutional considerations which would raise very severe problems for the Commission if it were now to seek this Court's approval of a mandatory right of access requirement applicable to broadcast stations.

[27] The Commission does not in its Petition contest the fact that the access rules require cable systems to operate as common carriers on their access channels, and indeed it could not do so. There are two basic tests for what constitutes communications common carriage—first, that a party hold itself out as willing to serve all members of the public indifferently, *National Association of Regulatory Utility Commissioners* v. *FCC*, 525 F.2d 630, 641 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976), and second, that the customer, and not the carrier, determine what will be transmitted, *National Association of Regulatory Utility Commissioners* v. *FCC*, 533 F.2d 601, 609 (D.C. Cir. 1976). Sections 76.256(d)(1) and (3) (A 173-74) of the Commission's rules require cable systems subject to the access rules to meet the first of these tests, and Section 76.256(b) (A 172-73) requires them to meet the second.

NBMC does contest the Court's conclusion that the access rules impose common carrier obligations (Pet. 27-28, n. 13), but the factual premises of its argument are erroneous. Access programming does not have third priority on cable channels after broadcast signals and pay cable programming. One channel must from the outset be dedicated solely to access (§ 76.254(b) (A 202)), and the Commission will refuse to authorize the commencement of operation of new systems or the additon of

systems that went beyond the types of regulation the Commission might impose on broadcasters.[28] This conclusion was plainly correct in light of the specific language on Section 3(h), this Court's discussion of Section 3(h) in *CBS*, 412 U.S. at 107-08, and the failure of Congressional efforts to impose common carrier obligations on broadcasters and constituted a further reason why the access rules were not consistent with the reasonably ancillary test for determining the extent of the Commission's jurisdiction over cable systems.

new signals to existing cable systems if their activated channel capacity is insufficient to provide at least one full channel for access programming. Order, ¶ 64 (A 139-41). The operating rules cable systems are required to adopt explicitly require first-come, non-discriminatory access and preclude program content control (§§ 76.256(d)(1) and (3), 76.256(b) (A 172-75). And cable operators are not limited to providing four access channels irrespective of channel capacity or demand but instead must increase the number of access channels without any limit other than the activated channel capacity of the system whenever specified usage criteria are met (§ 76.254(d) (A 171)).

[28] Another court has recognized that, under the reasonably ancillary test, the means of regulation the Commission applies to cable television must be consistent with the regulatory tools available to the Commission for the regulation of broadcast television:

> Moreover, given the similarities between cablecasting operations and broadcasting, we seriously doubt that the Communications Act could be construed to give the Commission "regulatory tools" over cable-casting that it did not have over broadcasting. *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 31 (D.C. Cir.), *cert. denied* 98 S.C. 111 (1977).

(c) There Is No Basis for Extending the Commission's Authority Over Cable Television Beyond that Consistent With Goals and Means Authorized for the Regulation of Television Broadcasting.

The Commission does not attempt to respond directly to those portions of the opinion of the Eighth Circuit discussing why the access rules are inconsistent with both the goals and means specified in the Communications Act for the regulation of television broadcasting.[29] Instead, it argues that even if the decision of the Eighth Circuit is determined to be consistent with *Midwest I*, the opinion raises an important issue which has not heretofore been addressed by this Court—whether the Commission's regulatory authority over cable television is limited by the nature of its regulation in the broadcasting area (Pet. 10-13). The Eighth Circuit correctly concluded that that question was answered by *Midwest I* (A 24-31). The language of the plurality opinion in *Midwest I* quoted above concerning the absence ot regulatory objectives in Section 2(a), followed by this Court's extensive analysis of the rule there before it and the provisions of the Communica-

[29] The Commission (Pet. 10-11, n. 8) and ACLU (Pet. 25) refer to language by this Court in *CBS*, raising the possibility that the Commission might conceivably at some future date devise a limited right of access that is both practicable and desirable (Pet. 10-11, n. 8). But the access rules are not limited in scope and the language cited in any event cannot be construed as constituting this Court's approval of a type of regulation that was not then before it. Similarly, the Commission intimates (Pet. 9-10, n. 6) that a footnote reference to the access rules in this Court's *Midwest I* decision constituted recognition of a "linkage" between origination and access requirements. But as the Eighth Circuit noted (A 33-34, n. 38), the access rules were not before this Court at that time, and no determination concerning their consistency with *Midwest I* can be read into that opinion.

tions Act, which led the Court to conclude that the mandatory origination rule was within the Commission's mandate for the regulation of television broadcasting, would otherwise have been unnecessary. This conclusion is reinforced by the close division of this Court in *Midwest I*, with only four Justices joining in the plurality decision, four Justices dissenting, and the Chief Justice occurring in the result but stating:

> Candor requires acknowledgment, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts. The almost explosive development of CATV suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the courts. 406 U.S. at 676.[30]

[30] In fact, Congress has commenced an extensive review of cable television and whether additional legislation covering its regulation should be adopted. See Cable Television: Promise v. Regulatory Performance, Subcommittee Print prepared by the Staff for the use of the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, U.S. House of Representatives January 1976 (94th Cong., 2nd Session); Cable Television Regulation Oversight, Part I (Serial No. 94-137) and Part II (Serial No. 94-138), Hearings Before the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 94th Congress, Second Session (1976); "Options for Cable Television Regulation," published in Option Papers, prepared by the Staff for use by the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 95th Cong., 1st Session, May 1977, Committee Print 95-13; Cable Television (Serial No. 95-32), Hearings before the Subcommittee on Communications of the Committee on Commerce, Science and Transportation, U.S. Senate, 95th Cong., 1st Session (1977).

Moreover, in asking this Court to review whether the broadcast regulatory provisions of the Communications Act set limits on its regulatory authority over cable television, the Commission does not even suggest what other limitations might be applicable or where such limitations might be found.[31] Thus, it appears that the Commission is seeking a determination that it has virtually unlimited regulatory authority over cable television pursuant to Section 2(a), contrary to this Court's explicit determination to the contrary in the plurality opinion in *Midwest I*. The problems resulting from such a determination are convincingly described by the Eighth Circuit (A 32-53).

IV. CONSTITUTIONAL ISSUES

(a) First Amendment

The Eighth Circuit also concluded that the access rules raised constitutional questions which reinforced its views on the jurisdictional issue (A 65) and would have led it to find the rules constitutionally impermissible (A 74) had it been necessary to do so. It is hard to see how the Court could have reached any other conclusion. While the Commission's authority to regulate broadcast signal carriage has withstood First Amendment attack,[32] this Court has

[31] NBMC's jurisdictional argument is subject to a similar infirmity. It criticizes the Eighth Circuit's conclusion that cable regulations must be analogous to television broadcast regulations and argues that the Eighth Circuit should have focused on whether access is a legitimate means to insure that cable systems satisfactorily meet community needs (Pet. 26-27). But it does not address the relevance of *CBS* to the jurisdictional issue or indicate any source of limitation on the Commission's authority if the statutory provisions applicable to broadcasting may be ignored.

[32] See cases cited at the Commission's Pet. 14, n. 13.

recognized that the reception service of cable television systems and its origination service are "separate and different operations". *TelePrompTer Corp.* v. *Columbia Broadcasting System, Inc.*, 414 U.S. 394, 405 (1974) ("TelePrompter"). The provision of access services is not a reception service. In providing origination services such as access, cable systems, like newspapers, are entitled to the full First Amendment rights of all private media and not the more limited First Amendment rights applicable to broadcasters.[33] This Court has specifically held that

[33] In addition to the Eighth Circuit, the D.C. Circuit also has recognized that cable television systems, in their origination functions, should be treated like newspapers. *Home Box Office, Inc.* v. *FCC*, *supra*, at 44-46. The Commission, however, cites *Red Lion Broadcasting* v. *FCC*, 395 U.S. 367 (1969) for the proposition that this Court has distinguished for First Amendment purposes between the electronic broadcast media and the print media and then goes on to argue that cable systems should be regulated like broadcasters rather than newspapers because cable systems are heavily regulated, while newspapers are not (Pet. 14-15). See also ACLU Pet. at 20. In a similar vein, NBMC argues that if the Commission has jurisdiction to impose access rules, this would result in cable systems losing their status as private media and subject them to the same limitations on First Amendment rights as are applicable to broadcasters (Pet. 31-32). But as this Court's opinion in *CBS* makes clear, 412 U.S. at 101-03, the difference in treatment between broadcast media and the press does not turn on the extent to which each is regulated or whether one operates within the jurisdiction of the Commission while the other does not, but is instead a direct result of the scarcity of broadcast frequencies—a factor which does not affect the availability of cable television channels.

ACLU argues that cable channels are scarce for First Amendment purposes (Pet. 16, n. 11). Its argument is based upon an erroneous factual premise—that most cable television franchises are exclusive. In fact, the opposite is true. As noted in Rand Corporation study of cable television franchising, "[m]ost franchises are nonexclusive in the sense that the city reserves the right to franchise more than the operator within the same geogra-

an enforceable right of access to newspaper violates the First Amendment because "the cost in printing and composing time and materials and in taking up space... could be devoted to other material the newspaper may have preferred to print" and because a "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'" *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256-57 (1974) (*Tornillo*).[34] Moreover, even as to broadcast media, the imposition of access

phic area." Johnson, Leland L. and Botein, Michael, *Cable Television: The Process of Franchising*, (Rand Corporation, March 1973, No. R-1135-NSF) at p. 29. ACLU's argument is also legally incorrect. It is technologically possible to increase the number of cable television channels almost ad infinitum simply by installing additional cables. While there are economic constraints in such an approach, just as there are economic constraints involved in starting a new newspaper, those kinds of restraints have not been considered constitutionally relevant. See *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 247-256 (1974) and *Home Box Office*, 567 F.2d at 46. ACLU also argues (Pet. 22-23) that cable systems are analogous to common carriers and that it does not violate First Amendment rights to require carriers to carry the public's messages. But the Commission has never attempted to base its regulation of cable systems on its common carrier authority, so that question is not properly before the Court. Moreover, any effort to do so would, as the Eighth Circuit recognized (A 62), be contrary to *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583 (1926).

[34] ACLU asserts (Pet. 25-26) that government involvement in administering the access rules would be minimal if the increased channel capacity requirements of the access rules were enforced and seeks also to analogize the access rules to time, place and manner regulations (Pet. 15). *Tornillo* effectively answers both of these contentions. Newspapers can more easily increase their pages than can cable operators increase their channels, but that factor did not save the Florida right of access law. Nor did the Court in *Tornillo* consider the right of access requirement there before it, which was much less burdensome than the cable television access rules, to be a mere time, place and manner regulation.

requirements would, as recognized by the Eighth Circuit (A 73), be of doubtful constitutional validity both in light of this Court's discussion in *CBS* of the Congressional intention not to impose common carrier obligations on broadcasters, 412 U.S. at 105-09, to accord them wide discretion in the issues they treat, 412 U.S. at 124-125, and the manner of treating them, and in light of this Court's recognition of the government involvement that would be required to administer a right of access on broadcast facilities. 412 U.S. at 126-27.

The Commission argues (Pet. 13-14) that the Eighth Circuit's analysis is contrary to *Midwest I* in rejecting the nexus between broadcast signal transmission and cablecasting and the interdependencies between the retransmission and origination functions of cable systems.[35] This argument is startling in light of the Commission's argument that this Court should review whether any nexus with broadcast regulation is required in order for the Commission to support its jurisdiction over cable television (Pet. 10-11). Apparently it is the Commission's position that for First Amendment purposes cable systems must be treated as broadcasters because of the nexus between broadcast signal retransmission and cablecasting but that no similar nexus to the Commission's broadcast regulatory authority is necessary to support its jurisdiction. But even if it were possible to explain away this inconsistency, the only reason specified by the Commission for requiring such a nexus for First Amendment purposes would be to justify an

[35] ACLU makes a similar argument (Pet. 19). Aside from ignoring this Court's decision in *TelePrompTer*, a similar argument was also rejected in *Home Box Office*, 567 F.2d at 45, n. 80.

otherwise impermissible limitation on speech. But limitations on speech, when permissible at all, require substantial justification, such as regulation of a scarce public resource which justifies limitations on the First Amendment rights of broadcasters, and no such justification has been shown here. Cf. *United States* v. *O'Brien*, 391 U.S. 367, 376-77 (1968).

(b) Due Process

Finally, the Commission seeks to dispose of the Eighth Circuit's discussion of the due process issue (A 77-82) in a footnote (Pet. 16-17, n. 17), arguing in substance that, based upon this Court's *Midwest I* decision, there can be no confiscation in violation of the due process clause if the access rules are within the Commission's jurisdiction. But the mandatory origination rule before the Court in *Midwest I*, while burdensome, did not preclude a cable operator from recovering the costs he might incur in complying with the rule and did not require the dedication of his property to public purposes. The cable operator had considerable discretion in how to meet its requirements, how much time to provide, and how to recoup his costs, such as through advertising or the sale of channel time. The access rules, on the other hand, require the cable operator to dedicate a minimum of three channels to public use without compensation. Such a requirement is clearly contrary to such cases as *U.S.* v. *Kansas City Life Insurance Co.*, 339 U.S. 799 (1950) and *U.S.* v. *Causby*, 328 U.S. 256 (1946), cited by the Eighth Circuit, as well as *Eyherabide* v. *U.S.*, 345 F.2d 565 (Ct.Cl. 1965).

V. CONCLUSION

For the reasons set forth above, this case is not sufficiently important to warrant Supreme Court review and in any event it correctly applied the relevant jurisdictional, First Amendment and due process tests established by this Court to the situation before it. This Court should therefore deny the Petitions for the Writs of Certiorari.

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